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IN THE

Supreme Court of the United States

October Term, 1968

No. 1212

BOARD OF TRUSTEES OF THE GALVESTON WHARVES and THE CITY OF GALVESTON, TEXAS,
Petitioners,

v.

UNITED INDUSTRIAL WORKERS OF THE SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, ATLANTIC, GULF, LAKES AND INLAND WATERS DISTRICT, MARINE ALLIED WORKERS DIVISION, AFL-CIO,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

1. Whether the Fifth Circuit's affirmance of the District Court's Order, restraining petitioner-carrier from availing itself of a Texas state court injunction that was issued pursuant to a Texas statute regulating public employer-employee labor relations, and barring respondent-union from picketing the carrier's premises, was necessary, in accordance with 28 U.S.C. § 2283, "to protect or effectuate" the District Court's judgment ordering collective bargaining pursuant to the Railway Labor Act, 45 USC § 156.

2. Whether the Fifth Circuit, as part of its Order to restore the status quo so that collective bargaining might go forward as required by the Railway Labor Act, correctly ordered the District Court to award backpay to the thirty-four employees who lost their jobs because the carrier breached its statutory duty to bargain.

Reasons for Denying the Writ

A. The Injunction Against the Carrier's Use of the State Court Injunction Is Warranted by 28 U.S.C. Sec. 2283, Because the State Court Injunction Conflicts with the District Court Order Mandating Collective Bargaining Between the Parties Under the Railway Labor Act.

The State court injunction in this case was granted pursuant to Art. 5154C of the Texas Revised Civil Statutes [1] which governs the conduct of public employees and employers in Texas. The only real question presented below, and sidestepped in the Petition, was whether this employer, because of its twin roles as a political subdivision of the state of Texas as well as a common carrier by rail under the Interstate Commerce Act, is governed in its labor relations with these employees by the Railway Labor Act or by conflicting Texas law. The law is crystal clear that petitioner's labor relations with these employees are controlled by the Railway Labor Act; it concedes this much. The law is equally clear that Texas law governing public employee

[1] Article 5154C provides: "It is against state public policy for its officials or those of its political subdivisions to bargain on contract with a labor organization concerning terms and conditions of employment of its employees. Public employees are prohibited from participating in an organized work stoppage or strike under penalty of losing civil service and other rights acquired as a result of their public employment. Employees may individually work without penalty and may present their grievances through a representative that does not claim the right to strike. No person shall be denied public employment because of membership or non-membership in a union."

relations, such as the statute on which the state court injunction was based, is not only irrelevant to these relationships but that any Texas court injunction based on that state law could only have the effect of thwarting the orderly processes of collective bargaining mandated by the federal statute.

Three scholarly decisions of the Fifth Circuit, embodying the views of no less than eight of its judges have held and reaffirmed that this carrier-petitioner flagrantly flouted its duty to bargain with respondent-union, both in failing to give notice of its intent to lease the subject facility and in failing to bargain on the union's demand pursuant to Railway Labor Act, § 6, that bargaining proceed on this point. That Court three times now [2] has ordered the District Court to fashion suitable relief so that federally required bargaining might go forward as envisioned by the federal statute.

As part of implementing this statutory scheme the Circuit affirmed the District Judge's restraint of the carrier pursuant to § 2283, 28 U.S.C., from availing itself of a state court injunction that it had procured by convincing a Texas judge that these labor relations were governed by Texas Stat. Art. 5154C. The effect of this outstanding state court injunction, as both the District Judge and the Fifth Circuit recognized, was to evaporate the compulsion to bargain contained in these Fifth Circuit decisions, the District Court orders, and required by the federal statute.

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[2] The first time the Circuit reversed the District Court's characterization of this dispute as "minor," held that the carrier breached its statutory bargaining duty, and ordered the imposition of "suitable relief and sanction" citing two backpay cases. App. p. 20a. The second time the Court reversed the District Judge's refusal to award backpay and sent it back for an Order that would put these employees "substantially in the same position as if Galveston Wharves had complied with the Act" again citing backpay cases. App. pp. 35a-36a. The third time it just squarely held that backpay is a necessary component of an Order purporting to remedy breach of bargaining duty. App. pp. 72a-87a.

The heart of the issue is simple, indeed: what constraint is there on a carrier to bargain to agreement when it knows the union has no weapons at its disposal? The Railway Labor Act indisputably, and contrary to the inapposite Texas statute, preserves the union's right to self-help as part of the federal statutory scheme for achieving industrial peace by a balancing of bargaining power. Our argument is thus that what the federal act gives, Texas cannot take away. In this case disarming the union emasculated the District Court's bargaining order; the carrier could posture its way to impasse knowing full well the union had no economic recourse.

Thus on the obvious and fundamental issue § 2283 clearly is authority for the District Court to act to protect and effectuate its bargaining order. And as to this issue, as well as the peripheral issues raised in the petition, we respectfully submit that the learned opinion of the Fifth Circuit, reproduced as pages 87a-94a of Appendix H, so carefully traverses the arguments that we need only add a brief comment.

The Fifth Circuit's conclusion on the fundamental issue is supported by this Court's recent decision in *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 37 U.S.L. Week 4247 (March 25, 1969). That case involved two issues immediately germane to this case. The first was the propriety of a Florida State Court injunction against what the carrier had characterized as unlawful secondary activity by the union; the Florida Circuit Court agreed with this characterization in addition to finding that the secondary picketing constituted a violation of the State's restraint of trade laws. 37 U.S.L. Week at 4248. The second issue concerned the preemptive effect of the Railway Labor Act in an area, unlike that involved in the present case, that is not clearly regulated by the Federal Act. As this Court said, the Railway Labor Act is "silent" on the question of secondary activity, and on whether a state may

act "to impose whatever restrictions it wished on the parties' use of self help". 37 U.S.L. Week at 4250. On this latter issue this Court concluded "that the exercise of plenary state authority to curtail or entirely prohibit self-help would frustrate effective implementation of the Act's processes." *Ibid.* The Court's reasoning as to the permissible range of state jurisdiction over relationships otherwise governed by the Railway Labor Act, over the State's ability to prescribe what is permissible and what is non-permissible picketing is discussed as follows:

> ". . . The disputants' positions in the course of negotiation and mediation, and their willingness to submit to binding arbitration or abide by the recommendations of a presidential commission, would be seriously affected by the knowledge that after these procedures were exhausted a State would, say, prohibit the employees from striking or prevent the railroad from taking measures necessary to continue operating in the face of a strike. Such interference would be compounded if the disputants were—as they frequently would be—subjected to various and divergent state laws. Railway (and airline)* labor disputes typically present problems of national magnitude. A strike in one State often paralyzes transportation in an entire section of the United States, and transportation labor disputes frequently result in simultaneous work stoppages in many States.
>
> "The Railway Labor Act's entire scheme for the resolution of major disputes would become meaningless if the States could prohibit the parties from engaging in *any* self-help. And the potentials for conflict, see Building Trades Council v. Garmon, 359 U.S. 236, 249, 250, 43 LRRM 2838 (1959) (concurring opinion), and for the imposition of inconsistent state obligations, cf., Clearfield Trust Co. v. United States, 318 U.S. 363 (1943), are simply too great to allow each State which happens to gain personal jurisdiction over a party to a railroad labor dispute to decide for itself what economic-self-help he may or may not

* Footnote omitted.

> pursue. The determination of the permissible range of self-help 'cannot be left to the laws of the many States, for it would be fatal to the goals of the Act' if conduct were prohibited by state laws 'even though in furtherance of the federal scheme. The needs of the subject matter manifestly call for uniformity.' Machinists v. Central Airlines, Inc. 372 U.S. 682, 691-692, 52 LRRM 2803 (1963)." 37 U.S.L. Week at 4250-51.

In the course of its discussion as to the basis for *federal* determination of the permissible scope of secondary activity under the Railway Labor Act, this Court made it unmistakably clear that federal law preempts the field, that is, that although a State court may have jurisdiction over the parties and the subject matter, it must apply *federal* and not state law. This was precisely this Court's holding in *California* v. *Taylor*, 353 U.S. 557 (1953) on facts strikingly similar to the case at bar, and it is precisely this view that informed the Fifth Circuit's opinion when it stated:

> "[E]conomic action after exhaustion of Section 6 procedures is an integral part of the collective bargaining scheme Congress prescribed when it enacted the Railway Labor Act. The effect of the state court injunction against a possible Union strike is perhaps to render impotent the duty to bargain imposed by this Court,* Texas and Texas courts may not agree with this view, but when the Railway Labor Act is otherwise applicable—as it is here—the Texas view is irrelevant. For the Railway Labor Act preempts all state legislation purporting to regulate the labor relations of covered employees.[34]"[3]

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* Footnote omitted.

[3] The Court's footnote was

> "[34] For example, in the field of grievances—of minor disputes—neither a state nor a federal court has jurisdiction to determine matters of contract interpretation. *Order of Ry. Conductors* v. *Southern Ry.*, 1950, 339 U.S. 255, 70 S.Ct. 585, 94 L.Ed. 811 *Slocum* v. *Delaware, Lackawanna & W. R.R.*, 1950, 339 U.S. 239, 70 S.Ct. 577, 94 L.Ed. 795; *Order of Ry.*

Thus the Fifth Circuit anticipated this Court's holding in *Jacksonville Terminal,* by holding that federal law controls this case in its entirety to the exclusion of Texas law.

The *Jacksonville Terminal* dissent and majority would agree on this issue, in the case at bar. The dissent in *Jacksonville Terminal* only disagreed with the majority's conclusion that *secondary activity* fell within that area of labor relations barred to state jurisdiction despite the Act's silence on the matter. All of the Justices would agree, however, that a state has no jurisdiction whatever to regulate activity that *is* indisputably controlled by the Railway Labor Act, namely, the lawful *primary* activity of the union during the course of statutory bargaining procedures (37 U.S.L. Week at 4250). The Texas statute, and the injunction obtained thereunder interferes with the union's right to strike or picket whenever it would otherwise be free to do so within the federal scheme, a scheme "specifically touched" to use Justice Douglas' language. 37 U.S.L. Week at 4256, thus interfering with that federal scheme and therefore directly in conflict with the federal labor policy. To quote the Fifth Circuit again, basing itself on just that precise point made in this Court's earlier opinion in *California* v. *Taylor,* 353 U.S. 553 (1957):

> "In *California* v. *Taylor,* 1957, 353 U.S. 553, 77 S. Ct. 1037, 1 L.Ed. 2d 1034, the Carrier owned and operated by the State of California, contended that the minor disputes provisions of the Railway Labor Act were inapplicable to it and that its labor relations were specifically regulated under state statute. The Supreme Court replied:

Conductors v. *Pitney,* 1946, 326 U.S. 561, 66 S.Ct. 322, 90 L.Ed. 318. It is equally clear that federal, not state, law applies to awards of system boards of adjustment, which are enforceable only in federal courts. *International Ass'n of Machinists* v. *Central Airlines,* 1963, 372 U.S. 682, 83 S.Ct. 956, 10 L.Ed. 2d 67."

> 'Under the Railway Labor Act, not only would the employees of the Belt Railroad have a federally protected right to bargain collectively with their employer, but the terms of the collective-bargaining agreement that they have negotiated with the Belt Railroad would take precedence over conflicting provisions of the said civil service laws. 353 U.S. at 561, 1 L.Ed. 2d at 1039.'
>
> "The Court squarely held that the Railway Labor Act applied to state-owned carriers. Said the Court: 'The fact that under state law the employees of the Belt Railroad may have no legal right to strike reduces, but does not eliminate the possibility of a work stoppage. It was to meet such a possibility that the act's "reign of law" was established.' 353 U.S. at 566." (App. H, pp. 89a-90a)

Petitioners argue that there is no need to enjoin enforcement of the Texas injunction, even if it is based on inapplicable law, since, so the argument goes, the union here can't strike anyway until bargaining is over, and at that point, there is time enough for an appeal from the Texas injunction. This is just too facile. First, there is the fundamental point that no bargaining, in any meaningful sense, will take place until the carrier knows the union can strike if impasse is reached, or if it violates its duty to bargain in good faith. Thus, the carrier will only posture its way to impasse until the carrier knows that the union means business. It hardly behooves this carrier that has, for almost five years now, demonstrated an incredible resourcefulness in avoiding its bargaining obligation, to ask for another round of meaningless talks on the assumption that it will act in good faith even though it knows the union is impotent. The respondent-union knows better. So did Congress. That is why the right to strike and picket is part and parcel of the Railway Labor Act's major disputes procedures. See *Jacksonville Terminal, supra,* at n. 24, 37 U.S.L. Week at 4253. And that is precisely and specifically why the Texas Court injunction must be put by or it will pose an ineluctable obstacle to the District Court's bargaining order.

Secondly, the union may have the right to strike before bargaining is over. In fact, and as the Fifth Circuit pointed out (App. H, p. 91a) at the very time that the Texas injunction was issued, the carrier was itself in breach of the statute, and the union would have been free under the applicable decisions, to attempt to bring the carrier to the table by picketing. (App. H, p. 91a.)

See also, *Florida East Coast R.R.* v. *Brotherhood of Locomotive Engineers,* 362 F.2d 482, 486 (5th Cir. 1966).

Of course, petitioner's argument that the Fifth Circuit's order amounts to an order to the union to strike is just downright absurd; nowhere is that notion in the case. There is no warrant either to give credence to the idea that no injunction should issue since the union should be relegated to an appeal through the Texas courts, and, then ultimately to this Court for relief. This really is ineffable gall. Here is a carrier that, in the caustic words of the Fifth Circuit, posted a notice in "language which must be rare indeed in the contemporary history of railroad labor relations" (App. C, p. 16a), that it just would not have anything to do with the union in response to the union's Section 6 notice. It committed a flagrant violation of its duty to bargain both in failing to give the union an opportunity to bargain on its notice, or in failing to respond to the union's request to bargain. Both of these breaches are beyond dispute and are now the law of the case. (See App. E, p. 34a.) Thirty-four employees have been without their jobs for almost five years now as a result of this statutory violation. And despite this history, and a record of nothing but dilatory tactics and evasive maneuvers, the carrier must believe this Court is credulous indeed to believe that it will meet and "bargain" with this union even though the union is at the bargaining table with its hands tied by an utterly unjustified and illegitimate state court injunction.

They are, in effect, urging this Court that they be allowed to manipulate the Texas courts for another few

years, hoping that in the uncertainties of litigation they will *never* have to confront this union where the Railway Labor Act says that they must confront it and where they should have confronted it five years ago—either at the bargaining table or on the picket line. And as long as they think that the union can't do anything about it, they will meet *pro forma*, but with no intention of coming to an amicable settlement. That is why Congress wrote an economic weapon into the arsenal of a union's bargaining rights under the Act and it is also precisely why this respondent has to be free of any lurking restraint when it comes to the table. That is why the Fifth Circuit was so eminently correct when it said:

> ". . . The Union's right to bargain, guaranteed by the Act, 45 U.S.C. § 152, Fourth, and presently enforced by this Court, would be illusory without a right to strike when bargaining has run its course or if the Carrier continues to refuse to bargain. The Railway Labor Act, and the cases interpreting it, only forbid Union striking during the course of exhaustion of the Act's procedures (and during the statutory cooling-off periods after initiation of the proceedings, 30 days after mediatory efforts have failed, and after creation of an Emergency Board and thirty days thereafter). The right to strike is adjunct to the Union's statutory rights and implicit in our order. . This national labor policy cannot be frustrated by a state court injunction. To effectuate the judgment of the federal court, the district court properly enjoined the Carrier from availing itself of the state court injunction. If the Union is to be enjoined from picketing in the future, it must be enjoined under the Railway Labor Act, not under article 5154c of the Texas statutes; and it is to be enjoined in federal, not state, court". (App. H, 94a.)

We respectfully submit that once the preemption point is clear, petitioner's tortured approach to § 2283 falls of its own weight. If ever there was a case when a § 2283 injunction is necessary to "protect" and "effectuate" a federal court judgment this is it.

Petitioner strains to conjure up a "conflict" with the decisions of this Court in construction of Sec. 2283, by relying, as it did in the Fifth Circuit, on *Amalgamated Clothing Workers* v. *Richman Bros.*, 348 U.S. 511 (1955). Actually, this is as tenuous as the rest of their arguments. The Fifth Circuit distinguished the *Richman* case, relying instead on this Court's opinion in *Capital Service Inc.* v. *NLRB*, 347 U.S. 501 (1954) and we reproduce those two paragraphs because they dispel the carrier's argument so effectively:

> "Galveston relies upon *Amalgamated Clothing Workers* v. *Richman Bros.*, 1955, 348 U.S. 511, 75 S.Ct. 452, 99 L.Ed. 600. The Court in that case, however, specifically recognized that 'In no lawyer-like sense can the present proceeding be thought to be in aid of the District Court's jurisdiction.' 348 U.S. at 519, 99 L.Ed. at 609. The district court simply did not have jurisdiction over the matter in controversy; it had remanded the state cause when first removed to federal court. The court's non-existent jurisdiction therefore cannot be aided.' *Ibid.*
>
> "More in point is *Capital Service, Inc.* v. *NLRB*, 1954, 347 U.S. 501, 74 S.Ct. 699, 98 L.Ed. 887, a leading case on the 'in aid of jurisdiction' exception. A state court had enjoined all picketing arising from a labor dispute; the federal court enjoined only that which violated the National Labor Relations Act. The Board, to cure the conflict and enforce the injunction obtained pursuant to Section 10(1) of the Act, moved to enjoin the employer from giving effect to the state court order. The district court granted the stay as necessary in 'aid of its jurisdiction'. The Supreme Court granted relief under Section 2283, observing that the federal court must '. . . have unfettered power to decide for or against the Union, and to write such decree as it deemed necessary in order to effectuate the policies of the Act. . . . [To do so] it must be freed of all restraints from the other tribunal. 347 U.S. at 505, 506, 75 S.Ct. at 702-03." App. H, p. 90a.

In sum, petitioner is reaching desperately in this aspect of its argument. Federal law preempts the field of collec-

tive bargaining, if as here, the Railway Labor Act is applicable. Petitioner does not confront that issue in its petition. It relies instead on the sophistry of an alleged conflict with earlier decisions of this Court—a point adequately rebutted in the Fifth Circuit's unanimous opinion on that issue, and the notion that the § 2283 injunction is unnecessary to protect the District Court order compelling bargaining. Common sense, let alone the decisions, dictates that the bargaining order would be rendered useless by the outstanding state court injunction; the union would not have the leverage the federal act gives it. Of what significance, then, would the federal order to bargain to be? The answer is obvious. The carrier would like nothing better than to have the union now relegated to more perilous seas of litigation, this time in the Texas courts. However, § 2283 provides a remedy for the carrier's disingenuous manipulation of the state courts to avoid its incontestable duty to bargain under the Federal Act. It is within the plain meaning and intent of § 2283 for that relief to have issued in this case. There is nothing in the petition to warrant a grant of the petition on this Point.

B. The Fifth Circuit's Backpay Order Is An Integral Part of The Restoration of the Status Quo Mandated By Section 6 of the Railway Labor Act and Is Entirely Consistent with the Decision of This Court in *Brotherhood of Locomotive Engineers* v. *Missouri-Kansas-Texas R.R.*, 363 U.S. 528 (1960).

As we pointed out above the carrier committed a flagrant breach of its duty to bargain in this case. Not only did it not give the union representing these employees the requisite Section 6 notice announcing its intent to lease the grain elevator at which the affected 34 employees had long been employed, but it refused to meet or discuss the matter when the union itself served, properly, a section 6 notice of its own to put the matter on the bargaining table. In this way, the carrier breached its duty to bargain under the Railway Labor Act. This was the square holding of the

first Fifth Circuit opinion in this case, rendered almost four years ago on September 14, 1965. The bargaining order, and the mandate to fashion suitable relief and sanctions short of literal restoration of the status quo which would have meant "unscrambling" the lease was contained in that decision. (See App. H, 71a-72a.) The characterization of this case as one involving a "major dispute," and all the remedies radiating from that characterization was finalized in that first opinion. It is well past the time for the carrier to question that at this late stage, four years, many briefs and two additional Fifth Circuit opinions later. As the Fifth Circuit itself said on the second round before it:

> "[1] We observe, *in limine*, that the main thrust of appellee's argument on this appeal and cross-appeal, and reiterated in its post-argument supplemental brief, is that this court's prior opinion was erroneous, and that we should therefore review and revise the conclusions therein reached. Our previous ruling is the law of this case and will not be reconsidered on this second appeal. *Hildreth* v. *Union News Company*, 6 Cir. 1963, 315 F.2d 548." (App. E, p. 34a)

The time to appeal the characterization of this dispute as a "major dispute" to this Court has long since run.

The only issue, then, that is timely appealed to this Court via the petition is the propriety of the Fifth Circuit order to the District Court not to send the backpay issue to the System Board of Adjustment established by the parties' contract, but to decide the issue and make the award itself. The award of backpay in this case was found by the Fifth Circuit to be necessary to compel compliance with the status quo requirements of Section 6 of the Act. (See App. H, pp. 78a-79a.)

To have compelled literal compliance with the Railway Labor Act's status quo requirements would have required the Fifth Circuit to have ordered the "unscrambling of the lease" and the restoration of these employees to their

jobs just as if the statutory duty had never been breached. Obviously under such a situation the employees, in order to be made whole for the damage they suffered because the carrier violated its statutory duty, would be entitled to receive backpay for the period during which they did not have their jobs.

What the Fifth Circuit did do was to order restoration of the status quo short of a complete and literal return in order to avoid doing some injustice to the carrier, by ordering only that the employees be put back to work pending the completion of bargaining, that the carrier bargain as if the statute had never been violated, and that it pay the employees whatever they lost as a result of the statutory violation. This was the remedy for the statutory violation that took place here, and which violation itself is no longer an issue. The Fifth Circuit's explanation is utterly sound:

> "Backpay is a realistic assurance that there will be 'an impact on the duty to bargain to prevent the employer from getting a windfall from having violated the Act, while protecting the employees' benefits against the lapse of time.' 368 F.2d at 413. Only backpay will put the employees 'substantially in the same position as if Galveston Wharves had complied with the Act.' Ibid." (App. H, 79a).

As the Court further elaborated:

> ". . . As we have noted, however, the purpose of the relevant sections of the Act is maintenance of the status quo pending conference. The employees wrongfully laid off cannot be retroactively reinstated, but they can be retroactively compensated. This does not punish the Carrier. Nor does it constitute a windfall to the employees. It is the price of reconstructing the status quo; it compensates the employees for the losses incurred by their being laid off in violation of the Act." (App. H, p. 77a).

The carrier makes two arguments against the court-ordered back pay award in its petition: one is that the

order conflicts with other Circuit decisions; the second is that the decision will "result in repeated conflicts between the federal courts and administrative tribunals," resulting in "double-standards" and "forum shopping." (Brief for Petitioner, p. 24). Neither argument withstands scrutiny.

The order in no way conflicts with any Circuit's decisions. This alleged conflict is manufactured by petitioner by contrasting the uniform decisions of this Court and the Federal courts on wrongful discharge cases with the case at bar which has nothing at all to do with wrongful discharge, but with remedying a breach of the statutory bargaining duty and its concomitant status quo requirement. A wrongfully discharged employee may elect either to recover damage for wrongful discharge via a suit for breach of contract, see *Walker* v. *Southern Ry.*, 385 U.S. 196 (1966), or else go to the appropriate adjustment board for reinstatement and back pay. But the Fifth Circuit recognized the difference between these cases and the case at bar:

> "... We acknowledge that a disciplinary discharge in *breach of contract* is remediable either before the appropriate adjustment board or, upon the employee's election, in a damage action [18] where permissible under state law in state or, if diversity exists, in federal courts. But the employees here do *not* claim backpay for a breach of contract. Their claim arises out of a violation of the federal statute. The contract-dispute cases therefore are not relevant." (App. H, p. 80a) (Emphasis in original).

As the Fifth Circuit also pointed out (App. H, p. 80a) no administrative agency has jurisdiction over this matter. Thus the "imaginary horrible" of conflict conjured up by petitioner is pure fantasy. The contract between these parties, Article X, provides for the establishment of a system board of adjustment having jurisdiction of "disputes growing out of grievances or out of the interpretation or application of agreements ..." (App. H, p. 80a, fns. 19 and 21). This is not a dispute concerning the contract,

or a grievance, but a "major dispute" concerning the restoration of the *status quo ante* the carrier's breach of its statutory obligation bargain pursuant to RLA § 6. An arbitrator would not have the authority to grant backpay in this case since the claim does not arise out of a dispute concerning the agreement, and he would thus be exceeding his contractual and statutory authority to make such an award. *Gunther* v. *San Diego R.R.*, 382 U.S. 257 (1965); *International Ass'n of Machinists* v. *Central Airlines*, 372 U.S. 82 (1963); *United Steelworkers* v. *Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960). What possible conflict, then, between courts and administrative agencies would be created if a Federal Court made an order that no administrative agency, let alone a contractually established arbitration tribunal, would have the authority make?

Petitioners intone sorrowful litanies about the novelty of the backpay remedy. But ample authority for a judicially ordered restoration of the *status quo*, including a backpay award has been available for some time. In *Brotherhood of Locomotive Engineers* v. *Missouri-Kansas-Texas R.R.*, 363 U.S. 528 (1960), a District Court conditioned its grant of an employer requested injunction against a union strike over what was concededly a "minor dispute," upon the employer's maintenance of the status quo pending resolution of the dispute by the National Railroad Adjustment Board, *or*, in the alternative, payment of the affected employees if the contested changes were put into effect in advance of the Board's determination. In short, the District Court told the employer, in a "minor dispute" situation, that if the changes sought to be effectuated would have a serious dislocating impact on the employees, a District Court could, as a matter of equity, condition the use of its powers against them on employer maintenance of the status quo *or* interim payment of the affected employees. Now this was done in a "minor dispute" situation, as to which the statute contains no express status quo requirement and when the union strike threat was patently illegal (*Brotherhood of R.R. Trainmen* v. *Chicago River & Indiana R.R.*, 535 U.S. 39 (1957)). *A fortiori* in a "major dispute"

case, involving breach of § 6 of the Act, a section that expressly requires the carrier to maintain the status quo during bargaining, the power to order backpay is not a matter of equitable discretion, but of statutory command.

Since there is no administrative agency established under the Railway Labor Act to remedy what would be an unfair labor practice if it occurred under the LMRA, it is the courts that must fashion the remedies fashioned by the NLRB under the companion federal labor statute. That has been the case since this Court affirmed the power of a federal court to compel bargaining, without a prior administrative finding, in *Virginian Ry.* v. *System Federation #40,* 300 U.S. 515 (1937); also: *Texas & N.O. R.R.* v. *Brotherhood of R.R. Clerks,* 281 U.S. 548 (1930). Cf. *Jacksonville Terminal Co., supra.*

In conclusion, then, the remedy of awarding backpay for breach of the duty to bargain does not conflict with the decision of any other Court, but is, in fact, entirely consonant with this Court's decision in *M-K-T, supra,* as well as with the law under both the Railway Labor Act and the LMRA (see App. H, p. 77a). Moreover, it creates no conflict, or potential conflict between judicial and administrative tribunals, since there is no administrative tribunal that has jurisdiction to award backpay for breach of statutory duty under the Railway Labor Act. All that remains of petitioner's argument then is that courts may encounter some difficulty in working out the details of a backpay award. But the Federal Courts have been fashioning remedies for unfair labor practices under this Act since its inception; there is guidance from the decisions of the NLRB and the courts in implementing the self-same remedies under the LMRA. See App. H, pp. 81a-82a. Parker, *Monetary Recovery Under the Federal Labor Statutes,* 45 Texas L. Rev. 881 (1967); Cf. *Jacksonville Terminal,* 37 U.S. L. Week at 4251. Also, it is quite premature for the carrier to itemize all the grievances that it may have due to an absence of fair consideration of all the issues, because the backpay order itself has not yet been fashioned. It will

be time enough for an appeal if, after a hearing, the order that is fashioned does the carrier harm. At this stage of the litigation the only real issue is the propriety of a back-pay award as part of the restoration of the *status quo ante* the statutory breach, and on that question the Fifth Circuit was entirely sound.

Conclusion

The petition does not raise any issues meriting this Court's review. The issues raised by the petitioner's attack on the § 2283 injunction are camouflage for its attack on the Railway Labor Act's preemption of the law in this case. This is an attack the carrier cannot raise in a frontal assault, because all the decisions subvert its argument. The issue has been disposed of conclusively in *California v. Taylor, supra,* and this Court's recent opinion in *Jacksonville Terminal, supra.* And the protection of the Federal Court's Order to bargain is effected by restraining interference from a Texas injunction that was designed to impede full freedom of the parties under the controlling Federal Act. Petitioner's second point is equally disingenuous since there is, in fact, no administrative agency with competence to decide the backpay issue and since the remedy itself is so plainly mandated by the Act's *status quo* provisions as well as long established Federal labor policy. For these reasons the petition for certiorari should be denied in its entirety so that these thirty-four employees may finally avail themselves of the benefits of the Railway Labor Act.

Respectfully submitted,

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